Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Federal-State Joint Board on Universal Service	)	**CC Docket No. 96-45**
	)	

To: The Commission

Reply Comments of UTC

Pursuant to Section 1.415 of the Federal Communications Commission's (FCC) Rules, UTC, The Telecommunications Association (UTC),[1] hereby submits its reply comments in response to the *Recommended Decision* of the Federal-State Joint Board on Universal Service, released on November 8, 1996, in the above-captioned proceeding to implement the universal service provisions of the Telecommunications Act of 1996.

As the national representative on communications matters for the nation's electric, gas, and water utilities, and natural gas pipelines, UTC submitted comments in this proceeding regarding the Joint Board's recommended interpretation of the term "telecommunications service provider." Below, UTC again addresses this issue in the context of the comments filed by other parties to this proceeding. In addition, UTC addresses the Joint Board's recommendations with regard to the treatment of inside wiring, and state jurisdiction over commercial mobile radio services.

[1] UTC was formerly known as the Utilities Telecommunications Council.

I. Commenters Agree That The Joint Board Has Adopted An Overly Broad Interpretation Of What Constitutes A Telecommunications Service Provider

In its comments, UTC indicated concern that the Joint Board may have inadvertently adopted an overly-broad interpretation of who is required to contribute to universal service. Based on their comments it is apparent that a number of commenters agree with UTC.[2] Section 254(d) of the Telecommunications Act states that:

> *Every telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and non-discriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service.*

In implementing this provision the Joint Board must necessarily be constrained by the statutory definition of "telecommunications services." The Act defines telecommunications services as:

> *The offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.*

A. Offered For A Fee

As UTC pointed out in its comments, the requirement that the service be offered for a fee evidenced Congress' intent that the service only apply to commercial telecommunications services; that is, services offered on a for-profit basis rather than on a non-profit, cost-shared basis. Both APPA and LCRA agree with this analysis and urge the FCC to reject the Joint Board's recommendation that the Commission equate the phrase "for a fee" to with "something of value or monetary payment"[3] LCRA notes that such an interpretation is significantly more expansive than the Commission's interpretation of this

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2 *See,* American Public Power Association (APPA), Lower Colorado River Authority (LCRA) and National Rural Electric Cooperative Association (NRECA).

3 APPA, p. 9; and LCRA p. 7.

term in its "interconnection" proceeding.[4] In its August 8, 1996, *First Report and Order*, CC Docket 96-86, implementing the Act's interconnection provisions the FCC determined that *"cost-sharing for the construction and operation of private telecommunications networks is not within the definition of telecommunications services"* and concluded *"that such methods of cost sharing do not equate to a 'fee directly to the public' under the definition of telecommunications service."*[5]

Not only is such an interpretation consistent with existing FCC Rules that differentiate between non-profit, cost shared systems and systems used to provide for profit telecommunications services,[6] it is also consistent with sound public policy that encourages the development of cost-shared systems between and among state and local government agencies, public safety entities and public service utilities.[7] Therefore, consistent with its earlier interpretation, for purposes of universal service funding obligations the FCC should not consider non-profit, cost-shared systems as offering services for a "fee."

B. Carriers' Carrier Networks

Commenters also share UTC's concern with the Joint Board's recommendation as to the treatment of privately negotiated, individualized carriers' carrier arrangements. At paragraph 788 of the Recommended Decision the Joint Board states that carriers' carriers that provide service to other carriers on a "wholesale" basis should be required to contribute to universal service. This recommendation is based on the Board's opinion that

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4 LCRA, p. 7.

5 *First Report and Order*, CC Docket No. 96-98, para. 994, released August 8, 1996.

6 *See* Section 90.179(f) (Private radio channels above 800 MHz available to Industrial/Land Transportation and Business Radio Licensees may be used on a cost-shared, non-profit basis but not on a for-profit basis).

7 The Final Report of the Joint FCC and Commerce Department Public Safety Wireless Advisory Committee specifically advocates the development of cost-shared, non-profit systems to meet the needs of public safety and public service.

such carriers' activities are included in the phrase "*to such classes of eligible users as to be effectively available to a substantial portion of the public.*" The Joint Board indicates that in its *Second Report and Order* implementing Commercial Mobile Radio Service (CMRS) "[t]he Commission has interpreted this phrase to mean *"systems not dedicated exclusively to internal use,"* or systems that provide service to users other than significantly restricted classes."

As APPA notes, the Joint Board's analysis is flawed in several respects. For example, like UTC, APPA indicates that the Joint Board's heavy reliance upon the CMRS *Second Report and Order* is unwarranted. The statutory phrase that it cites is from the Budget Act's definition of CMRS which differs from the Telecommunications Act's definition of telecommunications services in several key respects. The most important difference between the two definitions is that unlike CMRS, telecommunications services must be offered *"to such classes of users as to be effectively available directly to the public."* As APPA indicates, Congress purposefully made this distinction in order to ensure that the determination of whether an entity is acting as a telecommunications service provider should focus on whether the service provider is itself directly offering service to the end-user public. The inclusion of the requirement that the service be offered directly to the public indicates Congressional intent not to regulate private wholesale carriers' carrier offerings as telecommunications services.

As UTC noted in its comments, by defining "telecommunications service" in the Telecommunications Act by reference to the "offering of telecommunications for a fee directly to the public," Congress is carrying forward a long-line of FCC and court

precedents that have distinguished regulated "common carriers" from unregulated "private carriers" based on their indiscriminate holding-out to the public to provide service.[8] The "effectively available" clause does not alter this analysis. This language was included to ensure that providers who offer service directly to certain broad classes of end users, rather than the public-at-large, are included within the scope of the definition. In this way, carriers who directly serve a sufficiently large segment of the public so as to make their service effectively available directly to a substantial portion of the public are considered telecommunications service providers. The "effectively available" clause is not intended to capture services that are indirectly offered to the general public; instead, the language is aimed at distinguishing between services that are directly offered to a discrete class of users, and direct offerings of service to a subclass of the public that is sufficiently numerous that they effectively constitute a virtual public.

Thus, as NRECA notes, a utility's provision of infrastructure, such as "dark fiber" or wholesale capacity to third-party carriers pursuant to privately negotiated, individualized contracts would not be a "direct" offering of service to the public, and would therefore not subject the utility to universal service contribution requirements.[9] Of course, an entity leasing such infrastructure or bulk capacity from a carrier's carrier and using it to provide for-profit service directly to the public would be offering "telecommunications service" and would be required to contribute to universal service.

Moreover, as LCRA indicates, to adopt an interpretation that is inconsistent with well-settled judicial precedent and the FCC's long history of permitting the sale or lease of excess capacity to other entities on a private carrier basis, would seriously disrupt existing

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8 *See, NARUC v.FCC (NARUC I)*, 525 F. 2d 630 (1976).
9 NRECA, p. 2.

relationships, and would significantly impair the ability of utilities to share their capacity with others including state and local government agencies.[10]

Finally, the exclusion of private "carriers' carrier" arrangements from the universal service contribution requirements is consistent with the overall intent of the Act to encourage additional facilities-based competition. As APPA indicates, such action will encourage utilities and other similarly-situated entities to use their facilities to accelerate the pace of deployment of the National Information Infrastructure, promote competition and advance universal service.[11] Accordingly, UTC urges the FCC to reject the Joint Board's overly broad interpretation of telecommunications service, and explicitly recognize the continued existence of private carriers' carrier arrangements.

II. Universal Service Support For Inside Wiring Is Outside The Scope Of The Act

UTC joins the chorus of commenters who question the Joint Board's recommendation that schools and libraries should receive universal service support for internal connections, such as inside wiring, and on the installation and maintenance of such connections. As laudable as the Joint Board's recommendations may be they are simply beyond the scope of the universal service provisions of the Telecommunications Act's.

While the Joint Board's characterization of internal connections as a type of service may be accurate, this is not dispositive. Rather, as Citizens Utilities points out, the service in question must be a telecommunications service.[12] The Act defines telecommunications as "*the transmission, between or among points specified by the user, of information of the user's choosing without change in the form or content of the information as sent and*

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10 LCRA, p. 7.
11 APPA, p. 2.
12 Citizens Utilities, p. 15.

received." UTC is unaware of any reasonable way to construe inside wiring, much less the installation and maintenance of inside wiring, as constituting the *transmission* of information. Since inside wiring and its installation are not telecommunications their provisioning is not a telecommunications service and therefore they fall outside of the permissible scope of universal service discounts. Moreover, as the Personal Communications Industry Association (PCIA) notes, this conclusion is reinforced by the FCC's existing policies on inside wiring.[13] The Commission has explicitly ruled that the installation and maintenance of inside wiring are not common carrier communications services.[14]

The inclusion of inside wiring within the range of permissible services that are eligible for reimbursement from universal service funds will have a dramatic impact upon the size of the fund and the required contributions of individual carriers. As MFS notes, the Joint Board is in effect proposing a broad tax on telecommunications carriers that should be approached with caution and specific guidance from Congress.[15]

III. CMRS Providers Should Not Be Required To Contribute Towards State Universal Service

A growing number of UTC's member utilities are either now offering CMRS or anticipate doing so in the near future, and as such, these new entrants fully expect to contribute their fair share to support interstate universal service. However, UTC respectfully disagrees with the Joint Board's finding that states may require CMRS

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13 PCIA, p. 21.
14 *See*, Detariffing the Installation and Maintenance of Inside Wiring, *Second Report and Order*, 1 FCC Rcd 1190 (1986).
15 MFS, p. 31.

providers to contribute to state universal service support mechanisms. CMRS is inherently an interstate service and should not be subject to state funding requirements.

UTC agrees with the Cellular Telecommunications Industry Association (CTIA) and PCIA who point to the explicit statutory language of Section 332 (c) of the Communications Act with regard to state universal service jurisdiction over CMRS providers as evidence that Congress did not intend CMRS providers to contribute towards state support mechanisms. Section 332(c) states:

> *Nothing in this paragraph shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such a state) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates.*

Thus, under the Act a CMRS provider my be subject to state universal service funding obligations only to the extent that they have become a substantial substitute for landline telephone service throughout a state.[16]

16 CTIA, pp. 14-15; and PICA, p. 32.

IV. Conclusion

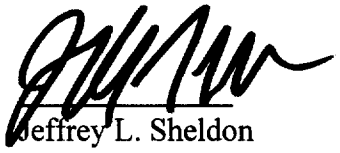
Commenters share UTC's concern that the Joint Board has recommended an overly broad interpretation of who is required to contribute to universal service as a telecommunications service provider. UTC urges the Commission to reject the Joint Board's recommended interpretation of "for a fee" as against the public interest and the FCC's prior interpretation of the phrase. Otherwise, such an interpretation would extend universal service contribution requirements to public safety and public service organizations that operate networks with other entities on a non-profit, cost shared basis. In addition, the FCC should resist efforts to broaden the definition of telecommunications carriers to include entities that provide wholesale capacity to other third-party carriers pursuant to privately negotiated carriers' carrier arrangements.

The Commission should not adopt the Joint Board's recommendations with regard to inside wiring and other internal connections as they are outside the scope of the Act's universal service provisions. Finally, the FCC should make clear that CMRS providers are not required to contribute towards intrastate universal service support funds except to the extent such CMR services are a substitute for land line telephone exchange service throughout a state.

WHEREFORE, THE PREMISES CONSIDERED, UTC requests the Federal Communications Commission to take action in accordance with the views expressed in these reply comments.

Respectfully submitted,

UTC

By: 
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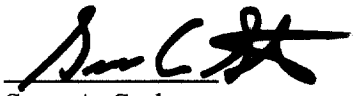
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